

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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In Re:

Petition for Arbitration of ITC^DeltaCom
Communications, Inc. with BellSouth
Telecommunications, Inc. Pursuant to the
Telecommunications Act of 1996

DOCKET NO.

03-00119

**ITC^DELTA COM, INC.'S RESPONSE TO BELL SOUTH TELECOMMUNICATIONS,
INC.'S MOTION TO REMOVE ISSUES FROM PROCEEDING FOR ARBITRATION**

I. INTRODUCTION

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") submits the following response to the Motion to Remove Issues filed by BellSouth Telecommunications, Inc. ("BellSouth") on July 2, 2003.

The remedy sought by BellSouth in its Motion is unprecedented. Without any legal support in the Telecommunications Act of 1996 ("Act"), BellSouth asks the Tennessee Regulatory Authority ("TRA") to rule that, as a matter of law, ITC^DeltaCom may not include certain issues in its Section 252 arbitration petition. Specifically, BellSouth seeks to "remove" issues 6, 9, 66 and 67 from this arbitration because BellSouth would prefer that these issues be resolved in other proceedings or not resolved at all. BellSouth relies solely on arguments of forum preference, administrative convenience and judicial economy. There is no statutory or case law supporting BellSouth's position. At bottom, BellSouth asks the TRA to *refuse to even*

consider some of the issues that remain unresolved from the negotiations conducted pursuant to Section 252 of the Act.

BellSouth has made the identical motion in other states where BellSouth and ICT^DeltaCom are also engaged in arbitration proceedings. In three states, Georgia, North Carolina, and Alabama, the state commissions have rejected BellSouth's motion.¹ No state commission has yet ruled in favor of BellSouth.

II. GENERAL RESPONSE

Section 252(b)(1) provides carriers the right to "petition a State commission to arbitrate *any* open issues." (emphasis added). That is exactly what ITC^DeltaCom has done in this case – sought arbitration by the TRA to arbitrate the unresolved or "open" issues remaining between the parties after months of negotiations.² The issues BellSouth seeks to remove from this arbitration are "open" and, by law, must be resolved prior to the execution of a new interconnection agreement.

BellSouth's Motion is an attempt to bypass the negotiation and arbitration process provided for by the Act. The federal courts have consistently upheld the integrity and importance of the arbitration process and have not allowed the parties or state commissions to bypass the obligations of Section 252. See, e.g., Pacific Bell v. Pac-West Telecomm, Inc., et al, 325 F.3d 1114 (9th Cir. 2003) (reversing California PUC promulgation of generic regulations for reciprocal compensation that would be binding on existing interconnection agreements without specific

¹ Alabama Public Service Commission Docket No. 28841, the Georgia Public Service Commission Docket No. 16583-U, and the North Carolina Utilities Commission (NCUC Docket No. P-500, Sub 18, *Order Denying BellSouth Motion to Remove Issues*, July 11, 2003).

references thereto); Verizon North, Inc. v. Strand, 309 F.3d 935 (6th Cir. 2002) (Act preempted Michigan PSC from requiring incumbent local exchange carrier to publish tariffs for network elements because it would allow entrant to avoid negotiation and arbitration process provided by Section 252).

The TRA itself has similarly held that Section 252 gives a state commission jurisdiction to resolve “any open issues” relating to interconnection and rebuffed efforts by BellSouth to exclude certain issues from the arbitration process. See Petition by ICG Telecom Group, Inc., Docket 99-00377, Final Order Arbitration, (August 4, 2000), at p.9.

Accepting BellSouth’s argument would amount to no less than “reverse” preemption by the TRA of federal law. Such a decision would constitute clearly reversible error. BellSouth may wish the Act required that all issues related to the implementation of local telephone competition to be dealt with in generic proceedings. Indeed, the TRA may find generic approaches attractive for convenience purposes. However, BellSouth’s preference on this subject and administrative convenience are immaterial because Congress has clearly provided in Section 252 that individual companies have a right to negotiate individual interconnection agreements and the right to have “any open issue” resolved through an arbitration proceeding.

III. SPECIFIC ISSUES ADDRESSED BY BELL SOUTH

A. Issue 9 – OSS Interfaces.

BellSouth argues that Issue 9 should be removed from this arbitration because the Federal Communications Commission (“FCC”) concluded in FCC Docket No. 01-277 that the checklist

² While ITC^DeltaCom originally sought arbitration regarding 71 issues, the parties have continued to negotiate since ITC^DeltaCom’s filing and have reduced the number of open issues to approximately 25.

item of “nondiscriminatory access to OSS” was satisfied for purposes of granting BellSouth long-distance authority pursuant to Section 271 of the Act. In effect, BellSouth argues that the FCC’s Advisory Opinion and the industry settlement in Tennessee in the Section 271 cases operate as *res judicata* on this Section 252 arbitration proceeding and preclude the Authority from considering any “open issue” related to OSS. BellSouth’s argument is not supported by the Act and misses the point. BellSouth has a continuing obligation under the Act to provide nondiscriminatory access to OSS. That obligation does not disappear simply because BellSouth has been authorized to provide long distance services to retail customers. Indeed, BellSouth’s obligations are now more important than ever because it no longer has the “carrot” of long distance authority as an incentive not to discriminate against competitors. Furthermore, there are continual changes in technology, in the nature of the local telephone market, and in the needs of competing carriers that will require, over time, changes in BellSouth’s OSS. A finding that BellSouth’s OSS were satisfactory at a point in time in the past has little to do with how the company’s systems are operating today or how they will need to operate over the life of a three-to-five year interconnection agreement.

BellSouth has argued that the language in the parties current agreement is sufficient, and the TRA will surely consider BellSouth’s substantive argument. The TRA should not, however, abdicate its obligation to resolve all open arbitration issues as required by the Act.

ITC^DeltaCom specifically asks BellSouth to provide interfaces for OSS that have functions equal to those provided by BellSouth to its own retail division. BellSouth opposes ITC^DeltaCom’s position, fighting to keep the TRA from even considering this issue. The TRA should reject this approach and fulfill its obligation under the Act to resolve Issue 9 in this arbitration proceeding.

B. Issues 6 (Facility Check Information), 66 (Testing of End User Data), and 67 (Availability of OSS Systems).

BellSouth characterizes the request by ITC^DeltaCom to arbitrate these three issues as an “attempt to circumvent BellSouth’s Change Control Process (“CCP”)” Motion, p. 3.

BellSouth goes on to extol the virtues of the CCP and its appeal procedure. Again, BellSouth relies on the review of the CCP by the TRA and the FCC during the 271 cases and argues that the CCP process “allows the CLEC community, as a whole, to determine (*i.e.*, rank) which OSS modifications are the most critical.” Motion, p. 4. BellSouth concludes that, “if DeltaCom is allowed to bring any of these issues in this Section 252 Arbitration (and the Authority were to order BellSouth to implement any of the requested changes), then these issues will go to the top of the CCP modification list as a regulatory mandate and supplant the CLEC community’s ranking.” Motion, p. 4.

BellSouth’s arguments are misleading. The CCP is a BellSouth-administered process. ITC^DeltaCom participates extensively in that process. Even if the CCP is endorsed by the TRA as a good process outside the Section 252 arbitration context, BellSouth is not the TRA and ITC^DeltaCom is not the entire CLEC industry. This is a Section 252 arbitration proceeding in which ITC^DeltaCom seeks the inclusion of particular language in its interconnection agreement. The only CLEC which is a party to this proceeding is ITC^DeltaCom, and the issues listed above are critical to an interconnection agreement that will allow ITC^DeltaCom to bring the benefits of competition to Tennessee consumers. Contrary to BellSouth’s implication, the TRA’s general

assessment that the CCP is a functioning process does not mean that, as a matter of law, the CCP is the sole forum for addressing OSS issues.³

The familiar undercurrent of BellSouth's argument is that if the Authority rules in ITC^DeltaCom's favor on any of these issues, then BellSouth potentially will be required to make similar accommodations to other CLECs. Again, this reflects BellSouth's apparent frustration and dissatisfaction with the arbitration process provided for by Congress in the Act. Specifically, BellSouth seems frustrated by the FCC's "pick and choose" rule, which was promulgated pursuant to Section 252(i) of the Act. In any event, BellSouth is free to make its substantive arguments on all of these issues, but there is no basis for BellSouth's contention that the Authority should refuse to decide them.

Respectfully submitted,
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³ Curiously, BellSouth asks to remove Issue 6 (Facility Check Information), arguing in footnote 3 in its Motion that there is an impact on performance measurements and the issue should be dealt with in the TRA's generic performance measurements docket. However, ITC^DeltaCom's understanding is that Issue 6 should be a closed issue in this arbitration since BellSouth is providing facility checks in Tennessee pursuant to orders of the TRA. (The Florida Commission has ordered BellSouth to provide facility checks as part of Florida's performance measures plan. The TRA has adopted the Florida plan.) BellSouth cannot seriously contend that it should be allowed to disregard the TRA's mandate for purposes of the interconnection agreement.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to:

Guy Hicks
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Nashville, TN 37201-3300

on this the 16th day of July, 2003.


Henry Walker